

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
BEFORE THE HONORABLE RUSSELL F. NELMS, JUDGE

In Re:	)	Case No. 09-42327-rfn13
	)	
RICHARD LEE ZIMMERMAN,	)	
	)	
Debtor.	)	
	)	
RICHARD LEE ZIMMERMAN,	)	Adv. No. 09-04237-rfn
	)	
Plaintiff,	)	<u>PLAINTIFF'S EMERGENCY MOTION</u>
	)	
v.	)	
	)	
J.P. MORGAN CHASE & COMPANY, et	)	
al.,	)	
	)	
Defendants.	)	Thursday, August 26, 2010
	)	Fort Worth, Texas

Appearances via telephone:

For the Plaintiff:	St. Clair Newbern, III, Esq. Clayton Everett, Esq. Law Offices of St. Clair Newbern, III, P.C. 1701 River Run, Suite 1000 Fort Worth, Texas 76107
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For Defendants FNBN1, LLC and PennyMac Loan Services, LLC:	Cristina Platon Camarata, Esq. Brice Vander Linden & Wernick 310 Amber Lane League City, Texas 77573
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For J. P. Morgan Chase & Company:	Rashad L. Blossom, Esq. Bradley Arant Boult Cummings, LLP One Federal Place 1819 Fifth Avenue North Birmingham, Alabama 35203
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*Plaintiff's Emergency Motion*

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1 Thursday, August 26, 2010

4:00 o'clock p.m.

2 P R O C E E D I N G S

3 THE COURT: Good afternoon. At four o'clock we have  
4 Zimmerman versus J.P. Morgan Chase. We are here on an emergency  
5 motion of the plaintiff Mr. Zimmerman. I've authorized all the  
6 parties to appear telephonically.

7 Let's go ahead and take appearances. First of all,  
8 let's hear from Zimmerman's counsel.

9 MR. NEWBERN: St. Clair Newbern, III and Clayton  
10 Everett for Mr. Zimmerman. Your Honor, we – we have this on a  
11 speakerphone so that Mr. – you can hear both of us. I'm not  
12 sure that's copacetic, but.

13 THE COURT: That's fine. You're fine.

14 MR. NEWBERN: Okay.

15 THE COURT: Okay. And counsel for PennyMac.

16 MS. CAMARATA: Christina Camarata, Your Honor, for  
17 PennyMac.

18 THE COURT: Okay. Anyone else?

19 MR. BLOSSOM: Rashad Blossom for J.P. Morgan Chase,  
20 Your Honor.

21 THE COURT: Okay. Okay, Mr. Newbern, it's your  
22 motion.

23 MR. NEWBERN: Okay. Your Honor, this – this adversary  
24 was originally filed by Mr. Zimmerman when he was representing  
25 himself *pro se*. He subsequently hired my firm to help him. And

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1 we have struggled with this case from the very beginning.

2 We spent an inordinate amount of time trying to figure  
3 out who all the parties were, based upon a very mysterious chain  
4 – chain of ownership of the original note that passed through at  
5 least four or five hands. And when at one of the hearings the  
6 Court directed Mr. Zimmerman and his counsel to make sure we got  
7 everybody in the chain of title into the – the lawsuit, and I  
8 believe we have – we have done that finally.

9 At the present time, it appears that the – the entity  
10 that claims to own the note is an entity called PennyMac, which  
11 is Ms. Camarata's client. And I believe that they assert that  
12 they acquired this from the FDIC.

13 We sent discovery back in...

14 MR. EVERETT: March.

15 MR. NEWBERN: ...in March of this year, with request  
16 for admissions, request for production, and interrogatories.  
17 And while the requests for admissions were responded to, I  
18 believe they were responded to timely, the interrogatories were  
19 not responded to until today. Ms. Camarata told us that she had  
20 – thought she had sent them to us, but hadn't. But she sent  
21 them to us today. So we got their interrogatories today.

22 And in looking at the interrogatories they have – or  
23 fall pretty far short of answering the questions. For instance:

24 Interrogatory Number "1: Please identify the person,  
25 describe the duties of the person answering these

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1 interrogatories.

2 "ANSWER: Ted Tomescu."

3 We've got his name, but we don't have his duties. And  
4 each of the other interrogatories are, in one way or the other,  
5 similarly nonresponsive.

6 And, more importantly, the interrogatories are not  
7 sworn to. So the – the discovery, in addition to being many  
8 months late in being provided to us, is – is not even in proper  
9 form and, in my view, does not satisfy the requirement to answer  
10 the interrogatories in a much more complete fashion. The – the  
11 answers look like they're just about as short as they can. And  
12 if they're not objecting to them, they're giving us some brief  
13 answer that doesn't really answer the – the question.

14 THE COURT: Did – the interrogatory responses, are  
15 they dated?

16 MR. NEWBERN: They – the certificate of service says  
17 they were served on us on the 9th day of April, but they  
18 weren't.

19 Yeah, the – the only – the only date on the  
20 interrogatories is April 9th, in the Certificate of Service,  
21 there's – as I pointed out a second ago, there is no affidavit  
22 acknowledgment of – of the answers by anyone. So we – we don't  
23 have a date there.

24 The only date on the response, that is the 9th day of  
25 April within the Certificate Of Service that said it was sent to

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1 us in the U.S. Mail or via electronic notification.

2 Have I answered your question?

3 THE COURT: Yes. Thank you.

4 MR. NEWBERN: Okay. The requests for production are  
5 also likewise less than satisfactory. In our – our motion for –  
6 to compel, we have attached as Exhibit B the responses to the  
7 requests for production. And many of the requests, rather than  
8 providing the documents, they – they object on some kind of  
9 basis. And then they have attached numerous documents to the –  
10 the answer. But they're – they're not – no, they're not tied to  
11 the – to the Request for Production Number 1.

12 Normally, when I – when I respond to Requests for  
13 Production Number 1, I would say, "Attached is exhibit A" or  
14 "the documents responsive to number 1." They've just – they've  
15 just attached documents. And we're supposed to, I guess, go  
16 through them and try to figure out what they're responsive to.

17 But one of the – one of the problems in this case is  
18 that the documents that show the chain of title consists of a  
19 note and then half a dozen or so allonges, all of which – none  
20 of which of the allonges are attached to the note, which I  
21 believe the law requires.

22 And when we looked at the originals in Ms. Camarata's  
23 present, she acknowledged that the allonges were not attached or  
24 affixed to the note. And so they've got a file of papers with a  
25 number of different allonges in there. And there's two or three

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1 of them that clearly appear to be rubberstamp signatures.

2 And one of the things that we've asked for was the  
3 authority in the – to authenticate those documents. And they –  
4 they can't do that. There's – there's no – there's no  
5 authentication of the – of the documents that the person that  
6 allegedly signed this assignment is, in fact, who they say they  
7 are and that they're authorized to do that. And I – I don't  
8 think we have to take it at face that just because they signed  
9 it and they gave us a piece of paper that had their name on it,  
10 that that's a proper assignment.

11 In some of the requests for production, they – when  
12 we asked for specific documents, the answer is, "Please see  
13 response for Request for Production Numbers 1, 5, and 9," rather  
14 then being more specific as to what documents they are expecting  
15 us to look at.

16 Now this – this is a problem with discovery. And  
17 there's another problem with discovery. We've been asking for  
18 some time for – to take a deposition of a representative of  
19 PennyMac who could, you know, identify these documents and  
20 explain them to us.

21 We finally took the deposition of Mr. Ted Tomescu, I  
22 guess it was the week before last, and Mr. Tomescu really didn't  
23 know a whole lot. And in his deposition – and I don't have it  
24 back from the court reporter yet – but my recollection was that  
25 there's several places in the deposition where he acknowledged

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1 that there were other people at PennyMac who had more or better  
2 knowledge of that particular subject than he did.

3 And he – one of the things that he claims to be is an  
4 assistant vice president of MERS, which is the Mortgage  
5 Electronic Registers System that some of these lenders used to  
6 avoid having to file assignments in the – in the deed records,  
7 like the law requires. And he – he has not been able to  
8 establish that he is an assistant secretary or whatever he  
9 claimed his title to be, other than just furnishing us loose  
10 pieces of paper.

11 And I – I did not complete the deposition of Mr.  
12 Tomescu because, for one reason, he indicated there were  
13 documents, emails, and I forget what other documents that he did  
14 have that were – should have been provided in response to our  
15 notice that he didn't bring with them, that he had back in  
16 California. And we were promised that they would provided it to  
17 us.

18 And I told Ms. Camarata at the deposition that – that  
19 if they got them to us and it was everything that we might be  
20 able to conclude the deposition by telephone, without having to  
21 bring you back. But we're having a very difficult time getting  
22 all the documents here. And my suspicion is that PennyMac  
23 doesn't have all these document, that all they've got is – is  
24 lots of paper with stamped signatures on it. And that they are  
25 – I hate to use the word fraud, but when you file claims and you

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1 don't have the documents to back them up, I don't know what else  
2 to call it. And this – these obligations are – have been passed  
3 around so many times, I don't think anybody knows who owns them  
4 or how they got here.

5           The problems with the discovery are – are compounded  
6 by the fact that the PennyMac has now filed two motions for  
7 summary judgment, shortly after they filed their Rule 26  
8 disclosure, back in the early part of August. And we've – we've  
9 got to either get some relief from when we have to answer to  
10 that summary judgment or get real busy trying to answer summary  
11 judgments with two affidavits in there of people that – one of  
12 whom they can't tell us how to find. And they've – they're  
13 using documents and – and arguments that keep – keep popping up  
14 new – new arguments all the time, so it's like trying to hit a  
15 moving target.

16           And I just – I guess I've just gotten pretty  
17 frustrated with – with this process with – with PennyMac here.  
18 And when – when you've got a document that – a claim that  
19 provides relies upon documents, I think you're entitled to – to  
20 receive all the documents that support that claim. And it's  
21 been like pulling teeth to get the documents from – from  
22 PennyMac and get accurate documents and not just pieces of  
23 paper.

24           So what we would like the Court to do is to rule that  
25 we – we don't have to answer the summary judgment motions until



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1 we've been able to complete discovery, to require PennyMac to go  
2 back through their request for production and interrogatories  
3 and do them correctly and – and promptly.

4 And I – I'd ask to take the deposition of the  
5 individuals who the proof of claim indicates signed the proof of  
6 claim. And that would be Ms. Camarata and Mr. Luzano  
7 (phonetic). And I – I believe that that's – is proper for the  
8 debtor here to depose whoever signed that proof of claim,  
9 because whoever signed that proof of claim based their signature  
10 on that proof of claim upon reviewing documents. If they  
11 didn't, then there's going to be a problem there, too.

12 THE COURT: Well, let me ask a question. PennyMac has  
13 filed a motion – or two motions for summary judgment. And I'm  
14 assuming that among other allegations – I haven't read the  
15 motions for summary judgment or reviewed the evidence in support  
16 of it yet – but I'm assuming that among the allegations they  
17 make there are that PennyMac is the owner and holder of the  
18 note; and in light of the fact that there's this disputed chain  
19 of title, I'm assuming that PennyMac addresses that in some way.  
20 So here's a question that I have for you about your discovery,  
21 Mr. Newbern, and that is: In those motions for summary judgment  
22 and – and the evidence that supports them is PennyMac making  
23 some broad-brushed allegations about the ownership of the note  
24 and deed of trust; and you tried to take discovery to find out  
25 the basis for those broad-brushed obligations; or have they made

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1 specific allegations about ownership of the note and you've  
2 tried to get discovery and you haven't been able to find any  
3 support or at least scant support for the specific allegations?

4 MR. NEWBERN: Yeah. The – the affidavits, one of them  
5 is – is from someone named Lori Lewis (phonetic), who at one  
6 point we asked her – asked them where she was, and they – they  
7 can tell us where she is. But their – they've thrown her  
8 affidavit in there as sort of a quasi-business record affidavit.  
9 But I don't think it qualifies as such. And they've – I think  
10 they loosely allege ownership.

11 They refer to the note and the allonges. They never  
12 addressed the issue or the fact that the allonges are not now  
13 and do not ever appear to have been attached to the notes. And  
14 I – I think the law is pretty – pretty clear that for an allonge  
15 to transfer a note it's got to be attached, it's got to be  
16 affixed to it.

17 And normally on a transfer of a note, you do it on the  
18 bottom of the note with a – normally you see a stamp on there  
19 that says so-and-so, and then they sign it. There's no stamps,  
20 there's no assignments on the – on the note itself. The only  
21 assignments are in these half a dozen or so allonges that are –  
22 are confusing. And, as I mentioned earlier, appear to be  
23 nothing more than rubberstamped signatures.

24 THE COURT: So, by your account, if you look at the  
25 motion for summary judgment, is the motion for summary judgment

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1 detective on its face?

2 MR. NEWBERN: I – I think they are, but it would  
3 require a good amount of work on our part to go through here and  
4 try to respond to this without – first, without our discovery  
5 being complete; without PennyMac having been required to address  
6 the – the discovery with regard to the production of documents  
7 and answer the interrogatories, to swear to them. We – we  
8 shouldn't have to answer a motion for summary judgment when  
9 there's discovery pending out there.

10 THE COURT: Ms. Camarata?

11 MS. CAMARATA: Hi, Judge. All right. Let me start  
12 off by saying that the plaintiffs have continued this trial  
13 three times. Until August there has been no discovery request  
14 made by the plaintiff in this adversary case.

15 The discovery that Mr. Newbern is talking about was  
16 filed in the main case. And it was to get discovery pursuant to  
17 an objection to the proof of claim. That discovery was timely  
18 answered. And it was sent to Mr. Newbern. I – and I – and I  
19 have not heard one word from him, prior to the filing of a  
20 motion to compel that there was any problem with any of the  
21 discovery that I sent with him – sent it to him.

22 There was no certificate of conference prior to filing  
23 the motion to compel. I never knew that he never received the  
24 interrogatories back in April. And he has propounded no  
25 discovery, no deposition notices, or anything else until August,

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1 in this case, Your Honor.

2 The discovery was thoroughly answered. As I said, he  
3 didn't dispute anything or have any questions about any of the  
4 answers. All of the relevant documents have been provided to  
5 Mr. Newbern. He has the complete chain of title. There is no  
6 dispute about the chain of title.

7 Moreover, this is a – we have the original note, the  
8 original deed of trust. This is bearer paper. The allonges are  
9 included in the file. There is no law that says that they have  
10 to be attached. It has to be in with the original, and they  
11 are.

12 Furthermore, this loan went through the FDIC. As  
13 such, the only evidence that can be considered is anything that  
14 is in writing. The law is pretty clear on that matter. And  
15 because of that the really only relevant information is what is  
16 in writing, the individual contract and what came from the FDIC.  
17 And he has all the information. The only basis for the  
18 objection to the proof of claim was documentation. He's got all  
19 the documentation. There is no need to have either Mr. Luzano  
20 or myself testify as to the documentation that was attached to  
21 the proof of claim.

22 THE COURT: Now who is Mr. Luzano?

23 MS. CAMARATA: Mr. Luzano is actually the attorney  
24 that prepared the proof of claim. My name is also on there, but  
25 I really have no personal knowledge of any of it because I

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1 didn't do any of it. They just had two names on the proof of  
2 claim when it was filed in this case.

3 And what he can testify to is how that claim was  
4 prepared and the documentation that he received from the client.  
5 But the client has already testified as to the documentation.  
6 And it has all been produced. And there really is nothing  
7 missing, whatsoever.

8 This case has basically – I mean Mr. Newbern talks  
9 about fraud. The debtor has done nothing in this case. He's  
10 made no payment. He has done nothing other than to try and sow  
11 discord regarding this case. The original allegations were not  
12 brought in good faith. They were not within the statute of  
13 limitations. The plaintiff knew that they were not within the  
14 statute of limitations. He has some of the same allegations in  
15 his objection to the proof of claim.

16 THE COURT: Is the adversary proceeding combined  
17 procedurally with the objection to the proof of claim?

18 MS. CAMARATA: Yes, it was, Your Honor.

19 MR. NEWBERN: They're – they're together in one – one  
20 place, Your Honor. The objection to claim and this adversary  
21 are all together.

22 THE COURT: Okay.

23 MS. CAMARATA: Okay. As soon as he asked for my  
24 client's deposition, that was provided. He did not have any  
25 difficulty whatsoever in getting my client here for a

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1 deposition, Your Honor. We did ask initially if it could be by  
2 phone, he refused. My client flew in from California  
3 specifically for the deposition. He was available as long as  
4 they needed him. And he answered all of their questions, even  
5 when the questions were borderline.

6 Ms. Lewis is, I believe, an ex-officer of one of the  
7 originating banks. I'm not sure which one, or maybe of both. I  
8 think maybe of both. I don't have her affidavit in front of me  
9 right now. But her affidavit was provided over a year ago. I  
10 don't know if she is still around or not. I believe she was in  
11 Utah at the time. But she is in no way affiliated with  
12 PennyMac.

13 And, in reality, since the loan went through the FDIC,  
14 since Ms. Lewis was there, it's really irrelevant. The only  
15 relevance is really since the FDIC took this over. The  
16 underlying organizations went into receivership. J.P. Morgan  
17 was one of the intervening entities that also held it for a  
18 certain amount of time, at least. But it – that was also before  
19 it went into receivership. So it's really not confusing. It's  
20 all laid for the plaintiff. They – they've seen every single  
21 document. It's all in chronological order.

22 Regarding the responses to the requests for  
23 production, there were objections in the responses and the  
24 documents were not, you know, one, two, three, four, five, six,  
25 because some of them applied to more than one question.

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1 However, each of the documents were listed in the responses as  
2 to which documents were being referred to.

3 And again, as I said, they weren't in this adversary,  
4 they were in the main case. So to file a motion to compel in  
5 this an adversary is really not the correct thing to do because  
6 the discovery was not propounded in this adversary.

7 THE COURT: Now you say the note – the note is made  
8 payable to bearer?

9 MS. CAMARATA: Well, we've got the original note, Your  
10 Honor. I mean –

11 THE COURT: Again, but that's my question.

12 MS. CAMARATA: If the bearer is –

13 THE COURT: Is – is the original note made payable to  
14 bearer?

15 MS. CAMARATA: It's not made a payable to bearer, but  
16 it's a bearer instrument. I mean the original note came to the  
17 original lender –

18 THE COURT: Isn't that unusual? I'm – I'm not  
19 familiar with – with promissory notes that support mortgages to  
20 typically be bearer notes, or am I – am I wrong about that?

21 MS. CAMARATA: They usually are bearer instruments,  
22 Your Honor, which is why the original notes are usually held in  
23 vaults and why they're never – you only get copies of them,  
24 unless you specifically ask for an original, because usually  
25 they – they are – if they're a paper, you know, the original –

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1 THE COURT: Oh, but let me — well, let me ask the  
2 question. The note that — the original of this note, who is it  
3 made payable to?

4 MS. CAMARATA: First National Bank of Nevada, I  
5 believe. And then it went to the First National Bank of  
6 Arizona.

7 THE COURT: Okay. And so how does a note like that  
8 ultimately become a bearer instrument?

9 MS. CAMARATA: Well, that's why they did the allonges,  
10 to go along with it.

11 THE COURT: Okay.

12 MR. NEWBERN: The — the problem here, Your Honor, is  
13 we don't know who did the allonges. We don't know that they  
14 were authorized to execute them, or that they were, you know — I  
15 — I could just have Mr. Everett here sign some, sign them for  
16 me, but —

17 MS. CAMARATA: Your — Your Honor, I do have that. I  
18 have an affidavit as to each one of those allonges and each one  
19 of the instruments. So there is that. There has been no one  
20 else that claims they own these notes and deed of trust. There  
21 is no opposition to us certifying that. And I don't see how the  
22 plaintiff can show that we are not the owner when we have all  
23 the documentation.

24 THE COURT: Well, I've seen some of these allonges, I  
25 recall. And — and, Ms. Camarata, the — these — these affidavits



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1 that you have, that you say accompany these – the notes and the  
2 allonges, do these affidavits basically address each one of the  
3 assignments? I mean are they – do they – at least can they be  
4 placed chronologically in order, so it goes from A to B to C to  
5 D, and then – and then the affidavits support that?

6 MS. CAMARATA: Yes, Your Honor, that's what I believe  
7 that we did. We have an affidavit as to prior to FDIC, as to  
8 all the allonges. And then we have an affidavit as to post that  
9 – FDIC.

10 THE COURT: And do you dispute that, Mr. Newbern?

11 MR. NEWBERN: I – I don't think that – I don't think  
12 we have an aff- – there's – there's two affidavits attached to  
13 the motion for summary judgment, one by someone at the FDIC and  
14 the other by Lori Lewis – is that who it was?

15 MS. CAMARATA: Lori Lewis, correct.

16 MR. NEWBERN: And – and I don't – I don't believe that  
17 these affidavits track the chain of title. If you look at Ms.  
18 Lewis' affidavit, it's pretty loosely-goosey about what she's  
19 saying. And, of course, we – we don't have the – I'm looking at  
20 Ms. Lewis' affidavit right now. And it says:

21 "My name is Lori Lewis. I'm more than 21 years of  
22 age, have never been convicted of a felony, am of sound mind and  
23 confidence make this affidavit. I acquired personal knowledge  
24 of all facts contained herein in my capacity as an officer of  
25 First National Bank of Arizona and First National Bank of

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1 Nevada. And all the information contained herein is true and  
2 correct."

3 And then she attaches eight pages of records from  
4 First National Bank of Arizona that – I don't see any – it  
5 certainly doesn't include all of the allonges. One of the  
6 allonges that they do attach, that has the signature of Amy  
7 Hawkins on it, it's an undated allonge. And it – it is pretty  
8 clear to me that these are stamped signatures.

9 THE COURT: Well, I suppose if there can be several  
10 different levels of problems when we get the documents like  
11 these, one of these could be a very carefully-crafted affidavit,  
12 in which Ms. Lewis says exhibit A is the original note; exhibit  
13 B is the assignment of the original note from – from A to B;  
14 exhibit C is the assignment of the note from C to D.

15 In other words, the documentation is all there and the  
16 chain a custody is proven up via the affidavit, with some degree  
17 of precision. But The plaintiff looks at that thing and says:  
18 'Well, you know what, it may be a well-crafted affidavit that  
19 establishes chain of title, but I don't how Ms. Lewis knows this  
20 stuff. It doesn't explain how it is that she has personal  
21 information about any of the things that she's testifying to in  
22 the affidavit. And so really it's a question of her  
23 credibility. And I have the right to take her deposition in  
24 order to test whether or not she's credible and whether she can  
25 ultimately substantiate those claims that are included in that

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1 affidavit.'

2 That's kind of one form of – of an attack upon that  
3 type of evidence.

4 The other one might be that, 'Hi. My name is Ms.  
5 Lewis. And appended hereto are the documents that relate to  
6 this case.'

7 And you look at those documents and, A, they – they  
8 either substantiate a chain of custody or, alternatively, they –  
9 they don't really do anything. They're just – they're there,  
10 but they're pretty ambiguous in terms of what it is that they  
11 mean. And it may very well be that we could go take an – we  
12 could go take a deposition of Ms. Lewis. And the only thing  
13 that Ms. Lewis could possibly say would be, 'All I can tell you  
14 is that these are the documents in our file.' And if that's all  
15 her affidavit says, then I don't know that we need to go take  
16 Ms. Lewis' deposition, because basically the affidavit contains  
17 everything that she knows.

18 So I could see in the first instance where there might  
19 be a need to take Ms. Lewis's deposition, to test whether or not  
20 she really knows the things that she's saying about. But if all  
21 she's saying is, 'I'm the custodian in the sense that I'm  
22 designated to be the custodian and these are the documents that  
23 are in our records,' then either those documents are going to be  
24 sufficient in and of themselves to get bank to where they want  
25 to be, or they're not going to be. But – but a deposition of

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1 Ms. Lewis is not really going to be very edifying.

2 So I guess one of the problems I'm having right now is  
3 I don't know which category this falls into or whether it's a  
4 different category that I'm just not thinking of right now.

5 MS. CAMARATA: Well, Your Honor, I believe that she is  
6 - I mean her affidavit is certainly sufficient. I don't see  
7 what else they could ask her about it.

8 She states in her affidavit she acquired knowledge of  
9 the facts, as her capacity as an officer of First National Bank  
10 of Arizona and of the First National Bank in Nevada. Those  
11 institutions went into receivership. They're no longer there.  
12 She has no records that she could even refer to. Everything  
13 went to the FDIC.

14 So - and, you know, this all happened a number of  
15 years ago. So her recollection may be somewhat different than  
16 the actual documents, which is one reason why the FDIC is  
17 allowed to rely on its defense that the only thing, you know,  
18 after a certain amount of time, is the only thing you can rely  
19 on is the written documentation that is in the loan file, which  
20 we have and which we have provided.

21 The plaintiff made no claims against the FDIC prior to  
22 that time period running out. So therefore my defense is that  
23 they have the written documents, there isn't anything else, and  
24 there's no need to even go look for Ms. Lewis. But of course  
25 they're welcome to go try and subpoena her. She's not an

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1 employee of PennyMac. You know, another attorney got her  
2 affidavit for me a year ago, which is when it was written and  
3 filed in this case.

4 MR. NEWBERN: Her affidavit doesn't say she's a  
5 custodian of the records. I mean I don't think you could make  
6 that affidavit into a business records affidavit.

7 MS. CAMARATA: No, it said she had personal knowledge.

8 MR. NEWBERN: All right. You could have knowledge and  
9 not be the custodian.

10 THE COURT: Well, no, no. You know when we're talking  
11 about things like notes and allonges,...

12 [IN THE BACKGROUND ON THE TELEPHONE]: Yeah, just go.  
13 I'll just --

14 THE COURT: I don't know that a note or an allonge can  
15 be authenticated as a business document. They're operative  
16 documents. Typically speaking, they're considered to be  
17 operative documents and not necessarily business documents.

18 I guess I need to go back to you, Mr. Newbern. What --  
19 what is it that you want here? I mean specifically what -- what  
20 relief do you want here?

21 I -- I get a lot of -- you know, I get a lot of  
22 discovery requests in which people go, 'They didn't turn over  
23 all the documents. Make them turn them all over;' and the other  
24 side goes, 'Well, we've given them everything that we've got.'  
25 That's a difficult request for me to respond to, because I don't

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1 know whether they have them or not.

2 MR. NEWBERN: Yeah.

3 THE COURT: But I think what we have Ms. Camarata  
4 saying is, is that 'Everything we've got that's responsive to  
5 the request we've given to them, and so there's not anything  
6 more for us to give to them.'

7 And if I look on your side, Mr. Newbern, and – and I  
8 say, 'Well, listen, if they've given me everything they've got,  
9 then they haven't got a case,' and I would think that you would  
10 be satisfied with that landscape and wouldn't want them to be  
11 turning over other things that could actually be prejudicial to  
12 your client, because if your position is is that 'What they've  
13 given me isn't sufficient,' then I think that's – that's exactly  
14 where you want to be.

15 So – and as far as the way that documents are  
16 produced, what the rule says is that you've produced them as  
17 they're kept in the ordinary course of business, or you can  
18 categorize them in specific response to one particular  
19 interrogatory or another, or a specific request for production.

20 So, you know, it sounds to me like the bank tried to  
21 adopt the latter procedure, and the debtor is saying, 'Well, I  
22 don't think they're responsive to requests for production number  
23 1 or number 5 or number 7.'

24 Well, but there again if the debtor has said, 'Give me  
25 these document – here's my request number 1. Give me these

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1 documents that show so-and-so'; and the defendant response to it  
2 says, 'Here's all of the documents that are responsive to that  
3 request'; and the plaintiff looks at him and goes, 'Well, those  
4 aren't responsive at all,' then in a sense that's as good as it  
5 gets for the plaintiff. Because to have documents that don't  
6 support the defendant's position is really what the plaintiff  
7 wants to establish in the first place. So I'm not sure what I  
8 can do about that.

9 On the issue of interrogatories, I guess I'm being  
10 told that the interrogatories are vague – vague and not really  
11 responsive. I'm not really sure what to do about that either.

12 MR. NEWBERN: They're not sworn to either.

13 THE COURT: Well, they do need to be sworn to.  
14 Insofar as – well, the motion to compel was brought in the  
15 adversary proceeding, but the requests were made in the context  
16 of a contested proceeding or a contested matter in the main  
17 case.

18 I think, Ms. Camarata, you're probably technically  
19 correct about that. But if they weren't ever – if they weren't  
20 sworn to and if they weren't served upon Mr. Newbern and the  
21 defense is, 'Well, really they should have brought this motion  
22 to compel in the context of the main case and not the adversary  
23 proceeding,' I might agree with you procedurally but disagree  
24 with you substantively.

25 And if – and I never know how to resolve the issue of,

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1 'Well, I sent them out' and the other side says, 'Well, I never  
2 received them.' A lot of times that just kind of boils down to  
3 my own familiarity with lawyers and – and whether or not I hear  
4 these kind of recurring themes from them – them or not. And all  
5 I can say about that is that I guess I deal pretty routinely  
6 with Mr. Newbern and I don't hear him say that very often. So  
7 if he said he didn't get it –

8 MS. CAMARATA: Your Honor?

9 THE COURT: Yes, ma'am.

10 MS. CAMARATA: And, Your Honor, and I told Mr. Newbern  
11 this. And I thought I had sent them out on April the 9th. What  
12 I sent was two copies of the responses to requests for  
13 production, instead of one copy of the response for request for  
14 production, and then the responses to the interros.

15 THE COURT: Okay. So –

16 MS. CAMARATA: So he – he said – no, there is no  
17 dispute that he did not get them when he should have.

18 THE COURT: Okay. All right. Well, that's – that's  
19 good to know.

20 MS. CAMARATA: Yeah. No.

21 THE COURT: All right. So –

22 MS. CAMARATA: I just wanted to make sure that was in  
23 there.

24 THE COURT: – then on that one, I mean if he just got  
25 responses to those requests for – well, up to those



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1 interrogatories, then on that grounds I'm willing to give him  
2 some additional time to respond to the motions for summary  
3 judgment. And so then it just gets down to a question - I - I  
4 don't know, Mr. - Mr. Newbern, are you asking to compel the  
5 PennyMac here to come - to produce witnesses in response to  
6 notices of deposition?

7 MR. NEWBERN: I - I don't think there's a notice on  
8 the table. They - they didn't file their Rule 26 disclosure  
9 until the first part of August, I believe. So - and they've had  
10 Mr. Tomescu in there and they had a little bit of information  
11 about documents. But - and we took his deposition. But the -  
12 the proof of claim is - if you look at the proof of claim that's  
13 filed with the Court, it is filed in such a way that both Ms.  
14 Camarata and Mr. Luzano signed it. And I - I doubt that both of  
15 them signed it. But whoever signed it, I would like to take  
16 that person's deposition because I'd like to know what documents  
17 they relied upon in - in signing that proof claim.

18 THE COURT: What's the relevance of the - well, I  
19 guess the proof of claim has been objected to.

20 MS. CAMARATA: Yes, Your Honor. But it's the exact  
21 same allegations that are in the adversary. And that's why they  
22 were consolidated.

23 The only thing he's objecting to in the proof of claim  
24 is the documentation that supports the lien. And that's the  
25 exact same allegation that he's got in the adversary. Mr.

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1 Luzano can speak to that. The stuff that was – the documents  
2 that were attached to the proof of claim regarding that issue  
3 would be the note, the deed of trust, the assignments, and  
4 allonges, all of that, which, you know, we – you know, there's  
5 no way that we would be able to authenticate any of those  
6 documents. Those were all the client's documents.

7 MR. NEWBERN: Here – here's the problem, Your Honor –

8 MS. CAMARATA: And –

9 MR. NEWBERN: – with – with – are you through,  
10 Cristine?

11 MS. CAMARATA: Well, –

12 THE COURT: Yes, I am. I'm listening.

13 MR. NEWBERN: Here's the problem with the – the  
14 assignment. It's – it is the original note – or deed of trust,  
15 assigns the deed of trust, or – or names MERS as a nominee. I  
16 don't know what that is. But after the deed of trust was filed,  
17 it – it doesn't appear anywhere until about a year ago, when Mr.  
18 Tomescu shows up as an assistant secretary of MERS, and he  
19 executes an assignment from MERS to PennyMac. I mean just out  
20 of the blue. And we don't have any – any proof other than Mr.  
21 Tomescu's word that he is an assistant secretary of MERS. My –

22 MS. CAMARATA: Your –

23 MR. NEWBERN: – research – my research is that MERS  
24 has some 20,000-plus assistant secretaries and assistant vice  
25 presidents all over the country that they appoint to execute –

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1 sign these documents as – as needed.

2 And I don't think that there's any – I – I'd almost  
3 bet money that there's no record of the board of directors of  
4 MERS ever appointing Mr. Tomescu as assistant secretary. Now  
5 they may be able to produce pieces of paper that say that. But  
6 they're – they're just hearsay. I mean they're just – they're –  
7 they're – they're just paper.

8 MS. CAMARATA: And we did provide the corporate  
9 resolutions to that, Your Honor, in response to the request for  
10 that at the deposition.

11 MR. NEWBERN: Yeah.

12 THE COURT: Well, but going back to Mr. Luzano, I  
13 don't know how Mr. Luzano is going to be able to add anything to  
14 all this. It strikes me that Mr. Luzano, in all likelihood  
15 being a lawyer Mr. Luzano relied upon conversations that he had  
16 with his client and relied upon – and – and relied upon some  
17 documents that he received in order to sign this proof of claim.

18 But, ultimately, if the documents themselves are  
19 insufficient, then I go back to one of my earlier points. And  
20 that is is that if you look at those documents and you say to  
21 yourself, 'Those documents don't get PennyMac to where they want  
22 to be,' then it strikes me that's where – that's the position  
23 that the debtor likes. And why you would want to go take Mr.  
24 Luzano's deposition, to have him fill in those blanks, I'm not  
25 sure why you'd want to do that if you can't – you know, if – if

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1 you've said produce people who can fill in the blanks, and  
2 they've already produced people, and your theory is they haven't  
3 filled in the blanks, then it seems that the debtor is in a  
4 position where he wants to be.

5 But I'm not sure that Mr. — that Mr. Luzano has very  
6 much to add to this process —

7 MR. NEWBERN: That was —

8 THE COURT: — even on an objection to claim. And if  
9 he's the person that signed the claim, he just signed as a  
10 lawyer. And if all he's going to do is just go, 'Well, this big  
11 stack of documents that we gave to you, that's what I based it  
12 upon.'

13 You want to disagree as to whether or not that gets  
14 you there or not, but I'm — if that's all that Mr. Luzano has,  
15 I'm not sure it either adds or detracts in any way from the  
16 case.

17 MR. NEWBERN: Very well. Can we have — I'm trying to  
18 think this — if we could have 21 days to respond to the motion  
19 for summary judgment, from whenever I get the properly-executed  
20 interrogatory, that would —

21 THE COURT: Okay. Let me ask this question: Do we  
22 have a hearing set for the motion for summary judgment, Ms.  
23 Camarata?

24 MS. CAMARATA: Yes, we do, Your Honor. September the  
25 8. And he did get the interrogatory today.

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1 THE COURT: Okay. All right. Then you want 21 days  
2 from the day that you receive the interrogatories; is that  
3 right, Mr. Newbern?

4 MR. NEWBERN: When I receive interrogatories that have  
5 been sworn to. The - the ones that we have are not - they're  
6 not sworn to. And I don't know who's going to swear to them.

7 THE COURT: Yeah, I take it -

8 MR. NEWBERN: Not that part of that -

9 THE COURT: - surely - surely you have somebody up  
10 there that can't swear to those - to those interrogatory  
11 responses, don't you, Ms. Camarata?

12 MS. CAMARATA: Yes. And it was Ted Tomescu who  
13 they've already deposed, Your Honor. And they deposed him on  
14 August the 16th. So I mean all those questions have been  
15 answered by Mr. Tomescu.

16 I really don't see where they need any additional time  
17 on this matter to respond to the - to the summary judgment.  
18 It's really pretty straightforward as, you know, this is the  
19 train of title and, you know, I - I just don't really see it.  
20 And he's already had a couple weeks.

21 THE COURT: Well, I understand but, you know, it's not  
22 really an interrogatory responds until it's verified by the  
23 party upon whom it's served. And right now it's basically -  
24 it's - it's a draft of an interrogatory response.

25 And so the - the problem that we have with that

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1 somewhere down the road is if the other side wants to rely upon  
2 the interrogatory responses, and the other one can always go,  
3 'Oh, well, Judge, we sent them a draft. That's - if you go look  
4 at it, it doesn't even bear our client's signature,' and then we  
5 have to broach the issue of whether or not that's the real  
6 interrogatory response or there's - there's just a complete  
7 default in responding to it. And what's the effect of the  
8 failure not to respond at all. Does it mean your pleadings get  
9 stricken, or whatever.

10 The easiest thing to do is just to ask Mr. Tomescu to  
11 go ahead and execute the verification of it. And that way our  
12 record will be clean, whichever way it happens to go.

13 MS. CAMARATA: Yeah, I will do that, Your Honor.

14 THE COURT: Okay. If you'll do that, then I'll give  
15 Mr. Newbern a 21-day extension of time on his hearing until such  
16 - the 21 days running from the date that he gets served with a  
17 copy of the signed responses to the interrogatories. And so  
18 then at that point, the parties, if you would, please, just get  
19 together with my Courtroom Deputy Ms. McCrory and see if there  
20 is - there is a convenient date following, whatever date that  
21 happens to be for the two of you, and see if you can get it set  
22 on that date.

23 MR. NEWBERN: Very well.

24 MS. CAMARATA: I will do so, Your Honor.

25 THE COURT: Okay, parties, thank you. We'll be

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1 adjourned.

2 MR. NEWBERN: Thank you for the -

3 MS. CAMARATA: Your Honor?

4 THE COURT: Oh, yes, ma'am.

5 MS. CAMARATA: We are set for trial, a docket call I  
6 think on September the 13th. So there is no way -

7 THE COURT: Right.

8 MS. CAMARATA: - that -

9 THE COURT: All right. We'll just move your - I'll  
10 tell you what we'll do, we'll - we're going to move you - we'll  
11 move you to your trial - we'll move you to a November trial  
12 docket call. That is November the 1st at 1:30.

13 MR. NEWBERN: Thank you, Your Honor.

14 MS. CAMARATA: Your Honor, are you going to be  
15 extending the deadlines on that or are we going to keep the  
16 deadlines the same as they are now?

17 THE COURT: Oh, let's just - no, we'll extend all  
18 deadlines. I'm not sure which form of scheduling order that we  
19 have like - whether we're under a default order or whether we're  
20 with the specific deadlines that are set forth in there. But  
21 we'll just run - will run it off of the default deadlines in  
22 relation to that November 1 date.

23 MS. CAMARATA: All right, Your Honor.

24 THE COURT: Okay?

25 MR. NEWBERN: Thank you.

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1 THE COURT: Thank you, parties.

2 MR. NEWBERN: Thank you.

3 MS. CAMARATA: Thank you.

4 MR. BLOSSOM: Thank you, Your Honor.

5 THE COURT: We adjourn.

6 (The hearing was concluded at 4:49 o'clock p.m.)

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State of California                 )  
County of San Joaquin            )      SS.

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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Dated September 27, 2010